

No. 13,015

In the United States Court of Appeals
for the Ninth Circuit

TITLE INSURANCE AND GUARANTY COMPANY, A CORPORATION; EDITH A. WILDE, ADMINISTRATRIX OF THE ESTATE OF JEROME J. WILDE, DECEASED, AND MERVYN GOODMAN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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(I)

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment entered February 9, 1951 (R. 5-16) as amended April 6, 1951 (R. 17-19). Notice of appeal was filed April 28, 1951 (R. 20-21). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether in awarding compensation for use and occupation of the condemned property from July

25, 1942, to December 13, 1950, the judgment conforms to the verdict of the jury.

STATEMENT

On July 25, 1942, the United States filed its petition to condemn the lands here involved, Parcels 16, 45, 46 and 50. At that time it entered into exclusive possession and control. The case came on for trial on December 11, 1950. On December 13, 1950, the court instructed the jury (R. 32-45). He concluded his instructions as follows (R. 44-45):

We have prepared a form of verdict for you, and it is rather lengthy. I am going to read it to you * * *.

And then the verdict, after setting up the square footage for parcels 16, 45, 46 and 50, reads as follows:

"We, the jury, find that the fair market value of Parcel 16, containing 4,611 square feet, is the sum of ----- dollars."

Now, after that blank, you should fill in a sum of money which you determine to be the fair market value of that property as of the date of the taking of possession by the Government. * * *

Then the verdict further reads:

"We, the jury, find the fair market value of the annual use of Parcel 16 is the sum of ----- dollars."

And again you should put a sum of money which is the value of the use for the period of time from July 25, 1942, to the present time * * *.

Now, then, you have two findings in the same form for Parcel 45, and you have two findings

in the same form for Parcel 46, and two findings in the same form for Parcel 50, and in each one the square footage of the property is different so that you will have to make the calculation in each case, and in respect to each parcel you will make the findings in an amount: (1) as the fair market value as of the date of the taking; (2) the value of the use and occupation referred to here, the fair market value of the annual use.

Now, that doesn't mean for one year, that means for the whole time. When they talk about the annual use they are talking about the annual use for the period of time from July 25, 1942, to the present time. [Emphasis added.]

The jury, however, was in some doubt as to the meaning of the second part of the verdict and returned for further instructions. Thereupon, there occurred the following (R. 46-47):

The COURT. * * * Mr. Foreman, am I correct in assuming that your question is that you want to know what the meaning of "Annual Use" is, what period of time that covers, is that correct?

The FOREMAN. That is right, your Honor. As it is typed here in the verdict it says, "We, the jury, find that the fair market value of the annual use of the various parcels is the sum of-----." We understood you to say that we were to put in a lump sum, but we didn't think your typed statement indicated that.

The COURT. That is right. I referred to that particularly and explained it, but I will explain

it again so that you may be sure. That portion as to each parcel that you are referring to refers to the period of the time from July 25, 1942, until the present time.

The FOREMAN. Yes.

The COURT. * * * you are to determine upon an annual value for the use and occupation times the number of years that are involved, so it will be a lump sum for the total period for the annual use and occupation. In other words, the annual use and occupation would be the use and occupation for one year times the number of years involved. You then determine the lump sum. Is that clear?

The FOREMAN. Your explanation is clear, sir, but—

The COURT. Well, the verdict will be interpreted in the light of the instructions. The term "Annual Use" is a term that refers to the use and occupation on an annual basis, but it is for the total period of time.

* * * * *

The FOREMAN. It will be understood that the value we put on the verdict is for the total time.

The COURT. That is right.

* * * * *

The FOREMAN. That didn't appear to be what the verdict shows.

The COURT. The verdict itself may be ambiguous in its language, but that is the interpretation we have put on it, that is the method you are to follow.

The FOREMAN. That answers our questions.

The same day the jury returned a verdict (R. 3-4) which read in part as follows:

We, the jury, find that the fair market value of Parcel 16 containing 4,611 sq. ft. is the sum of----- \$46.11
We, the jury, find that the fair market value of the annual use of Parcel 16 is the sum of----- \$20.00

The verdict went on to find that "the fair market value" of Parcel 45 was \$277.59 and "the fair market value of the annual use" of that parcel was \$125.00. In respect of Parcel 46 the awards were \$515.62 and \$232.50, respectively, and for Parcel 50 they were \$2400 and \$980.

Accordingly, judgment in these amounts was entered (see R. 8).

ARGUMENT

Appellants' assertion (Br. 3-4) that the judgment does not conform to the verdict must be premised upon the assumption that in finding "the fair market value of the annual use" of each of the parcels the jury found the value of one year's occupation and that consequently judgment should have been entered for each of these sums multiplied by the number of years of occupancy. In other words, since occupation endured from July 25, 1942, until December 13, 1950, it is appellants' position that each sum should be multiplied by slightly more than $8\frac{1}{3}$. In passing it may be observed that had the jury so found, it would have found that the value of use and occupation for this period far exceeded the value of the fee. For instance, Parcel 16 was valued at \$46.11. According to appellants, the jury found that occupancy from

July 25, 1942, to December 13, 1950, was something more than \$166.66!

The record, however, makes further discussion unnecessary. Though the form of finding preferred by the trial judge is somewhat unusual, he made it perfectly plain that the jury was to find the value of use and occupation for the total period of that occupation and not for a single year. It is equally clear that the jury understood the judge. There is no pretense that it acted contrary to its understanding. Accordingly, there is no basis for appellants' contention.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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